Supreme Court of the United States.

DECEMBER TERM, 1868.

No. 223.

Ex-parte, WILLIAM H. McCARDLE,

Appellant.

BRIEF OF RESPONDENTS,

TOUCHING THE EFFECT OF THE REPEALING ACT OF MARCH 27th, 1868.

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Appellant.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR RESPONDENTS.

In November, 1867, the appellant filed his petition in the Circuit Court, for the Southern District of Mississippi, alleging that he was illegally restrained of his liberty, by Gen. Gillem or Gen. Ord, or both; and prayed for a writ of *habeas corpus*, to be directed to the said officers. The writ was accordingly issued, and, in pursuance thereof, the appellant was produced in Court, and a full return made, setting forth the cause of the imprisonment. The Court decided, that the return was sufficient in law, and ordered that the prisoner be remanded to custody. From this judgment, an appeal was taken to this Court, under the provisions of the act of February 5, 1867. The appeal came on to be heard, and was argued by counsel, on the 2d, 3d, 4th and 9th days of March, 1868. But no judgment was rendered in the cause.

On the 27th day of March, 1868, an act of Congress was finally passed, and became a law, repealing so much of the act of February 5, 1867, as authorized appeals in cases of this character. The second section of said act is in the words following:

"SEC. 2. *And be it further enacted,* That so much of the act approved February five, eighteen hundred and sixty-seven, entitled 'An act to amend an act to establish the Judicial Courts of the United States,' approved September twenty-fourth, seventeen hundred and eighty-nine, as authorizes an appeal from the judgment of the Circuit Court, to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals, which have been or may hereafter be taken, be and the same is hereby repealed."

The question arising now, for consideration, is, whether or not, this Court has legal authority to determine the said appeal, notwithstanding the said act of Congress.

The appellate jurisdiction of this Court is qualified. It can exercise no appellate jurisdiction in any case, unless such jurisdiction is conferred upon it, by an act of Congress; and a rule is prescribed, to regulate the proceedings therein.—(*Wiscart v. Dauchy*, 3 Dal., 327; *Barry v. Marcien*, 5 How., 118.)

The Constitution of the United States, gives to Congress the power to "except" any or all of the cases, mentioned in the jurisdictional clause of that instrument, from the appellate jurisdiction of the Supreme Court.—(Art. III, sec. 2.) It was clearly the intention of Congress, by this act, to so "except" all cases of this kind, whether pending, or thereafter to be brought.

This Court never had appellate jurisdiction in such cases, until such jurisdiction was authorized by the act of 5th February, 1867. That act, so far as it confers authority to determine appeals, either pending then, or to be brought subsequently, has been repealed. When an act of Congress is repealed, it must be considered the same as if it had never been passed, except such parts as

are saved by the repealing statute.—(*Surtees v. Ellison*, 9 Barn. & Cress., 730; *Butler v. Palmer*, 1 Hill, 324.)

When the jurisdiction of a Court to determine a case, or a class of cases, depends upon a statute, and the statute is repealed, the jurisdiction ceases obsolutely. If any cause be pending at the time of such repeal, it falls.—(*Rex v. Justices of London*, 3 Burrow, 1456; *Norris v. Crocker*, 13 How., 429; *Ins. Co., v. Ritchie*, 5 Wallace, 541; *Gale v. Wells*, 7 How., Pr. Reps., N. Y. Court of Appeals; *Hollinsworth v. Virginia*, 3 Dal., 378.)

ENOCH TOTTEN,
Counsel for Respondents.

ARGUMENT

OF

HON. LYMAN TRUMBULL

IN THE

SUPREME COURT OF THE UNITED STATES,

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ARGUMENT.

May it please the Court: In entering upon the argument of this case, I feel that my associate [Mr. Carpenter] has left me little to say upon its general merits. The force and clearness with which he has presented the views we entertain, is such that I feel that I can add but little to them. Still, the importance of the case in one aspect will justify me in submitting my own views in regard to what should be a proper disposition of it.

I shall commence what I have to say by denying the jurisdiction of the Circuit Court under the act of February 5, 1867, to hear this cause; and if I establish that proposition, of course this court cannot entertain jurisdiction of it. The decision of the court denying the motion to dismiss the appeal does not touch this question of jurisdiction in the Circuit Court. That decision went to this extent, and no further; that under the act of February 5, 1867, an appeal lies from a *habeas corpus* proceeding, originally instituted in the Circuit Court, to this court; but, in their opinion, the court say :

"The latter jurisdiction," that is the jurisdiction of this court, "as has just been shown, is co-extensive with the former" (the jurisdiction of the Circuit Court.) "Every question of substance which the Circuit Court could decide, upon the return of the *habeas corpus* including the question of its own jurisdiction, may be revised here on appeal from its final judgment.

"But an inquiry on this motion into the jurisdiction of the Circuit Court would be pre-premature. It would extend to the merits of the cause in that court."

The court having refrained, therefore, from expressing its opinion or deciding on the jurisdiction of the Circuit Court, under the act of February 5, 1867, I shall now undertake to show that the Circuit Court did not have jurisdiction, and could not have had jurisdiction, under that act.

The act only professes to confer jurisdiction in *habeas corpus* cases not before provided for. Its language is, "in addition to the authority already conferred." Now, I take it to be a proposition, which nobody will controvert, that an act which undertakes to confer jurisdiction not before conferred, and in addition to that which was before conferred, does not and cannot be construed to mean to be an act conferring jurisdiction which already existed. That would be a contradiction of terms.

What is this case? McCardle is, by his own petition, stated to be in the custody of the military authorities under an order of General Ord, claiming to act under the authority of the United States. This is his own statement. Did the United States Circuit Court of Mississippi have jurisdiction anterior to the passage of the act of 1867, to grant a writ of *habeas corpus* in such a case? What says the 14th section of the judiciary act of 1789? That the courts of the United States shall have power to issue writs of *habeas corpus* in all cases

where persons are in custody, under or by color of the authority of the United States. I submit to this court if that is not precisely McCardle's case, as he himself stated it. Can there be any doubt that the Circuit Court would have had jurisdiction to issue this writ of *habeas corpus* if the act of 1867 had never been passed?

But if the court could ignore the provision of the statute which says it is made for the purpose of providing for cases not before provided for, will it ignore the last clause of the act of 1867, which reads as follows:

"This act shall not apply to the case of any person who is or may be held in the custody of the military authorities of the United States, charged with any military offence, or with having aided or abetted rebellion against the government of the United States prior to the passage of this act."

Suppose this petition of McCardle had alleged that he was in military custody, charged with having aided or abetted rebellion against the government, could the Circuit Court have entertained jurisdiction under this act? If these words mean anything, do they not mean that the Circuit Court should not take jurisdiction of a case of a person in military custody charged with aiding or abettiug rebellion? I leave out the other clause as to a person charged with a military offence, and speak only of one charged with aiding rebellion. Is it not manifest that if this record discloses such a case, the act of 1867 would not have authorized the issuing of the writ of *habeas corpus?*

But would it not have been competent for the Circuit Court, under the 14th section of the judiciary act of 1789, to have issued the writ in such a case? I apprehend nobody will deny that. If that be so, then the jurisdiction conferred by the act of February 5, 1867, is not the same thing as the jurisdiction conferred by the act of 1789; and if the jurisdiction is different under the two acts, this court must inquire under which the Circuit Court took jurisdiction of this case; and when you make that inquiry, suppose, as I said, it appeared that McCardle was charged with having aided the rebellion, would not the Court see at once that the jurisdiction must have been taken under the act of 1789, and not under that of 1867?

To illustrate this still further, let me refer to the act of August 29, 1842, authorizing a judge of a United States court, "in addition to the authority already conferred by law," to grant writs of *habeas corpus* in all cases of foreigners in custody, under authority of the United States, on account of any act done under any alleged authority of any foreign state, the validity of which depends on the law of nations, and authorizing an appeal from the decision of the judge to the Circuit Court, and from the Circuit Court to this court. That was a special jurisdiction, granted to issue writs of *habeas corpus* in behalf of foreigners claiming rights under the law of nations. The language of that statute is the same as that in the statute of February 5, 1867. It says, "in addition to the authority already conferred by law," authority shall be given to issue writs of *habeas corpus* in a particular class of cases.

I submit, if a person not a foreigner in custody under color of

United States authority, charged with an ordinary offence, could avail himself of the act of 1842 to obtain a writ of *habeas corpus*, and thereby, through an appeal given by that act, force a jurisdiction upon this court not given it in ordinary cases of *habeas corpus*. When such a case came here, I ask what your honors would have done? Would you not have looked at the case to see whether the Circuit Court had jurisdiction under the act of 1842? When you made that examination, and saw that it was not a case within that statute, would you not at once have dismissed the proceeding? So in this case, if your honors see that this proceeding was not, and could not have been, instituted under the act of 1867, you cannot apply that act to it for the purpose of taking jurisdiction.

Again, in a case to which I referred the court on the argument of the preliminary motion to dismiss the appeal, the case of Barry *vs.* Mercier, which was an attempt to bring into this court for review, under the 22d section of the judiciary act of 1789, a judgment of the Circuit Court not involving a sum of money or right of property which could be calculated in money, the court said:

"The question for this court to decide is, whether a controversy of this character can, by a fair and reasonable construction, be regarded as within the provisions of the 22d section of the act of 1789. Is it one of those cases in which we are authorized to re-examine the decision of a circuit court of the United States, and affirm or reverse its judgment? We think not. The words of the act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated in the ordinary mode of a business transaction. There are no words in the law which, by any just interpretation, can be held to extend the appellate jurisdiction beyond those limits, and authorize us to take cognizance of cases to which no test of money value can be applied."—(5 Howard, 120.)

It was not denied, in that case that the Circuit Court had jurisdiction of the case; that was admitted, but the Circuit Court did not have jurisdiction of it under that branch of the law which authorized this court to entertain jurisdiction and revise the decision. So in this case, the jurisdiction of the Circuit Court must have attached under the act of 1867, or else the appeal does not lie. Unless you say that the act of 1867 confers the same jurisdiction as before existed, and not, as it says, "additional" jurisdiction, how is it possible to bring the case of McCardle within it? Will it be said that the Circuit Court did not have jurisdiction under the act of 1789, when the case comes within its very letter? What was the statute of 1867 passed for, except to add to the jurisdiction before existing? It says so; and I see no escape from the position that, if the Circuit Court could have issued the writ under an act prior to that of 1867, it must have been issued under such prior act, and if so, the Circuit Court had no jurisdiction under the act of 1867, and consequently this court can have none.

There is another reason which seems to me conclusive against taking jurisdiction under the act of 1867. The last paragraph of that act is as follows: "This act shall not apply to the case of any person who is or may be held in custody of the military authorities of the United States charged with any military offence." The record shows, and about that there is and can be no controversy, that Mc-

Cardle was in custody of the military authorities of the United States; and what was he charged with? With inciting insurrection, disorder, and violence, and with disturbing the peace, in violation of the act of March 2, 1867.

Now what is that act? That he was in military custody there can be no doubt. Was he charged with a military offence? To answer this question, reference must be had to the act of March 2, 1867, to provide for the more efficient government of the rebel States.

The preamble declares that—

"Whereas, no legal State governments, or adequate protection for life or property, now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas, it is necessary that peace and good order should be enforced in said States, until loyal and republican State governments can be legally established—"

Then the act proceeds to enact—

"That said rebel States shall be divided into military districts, and made subject to the military authority of the United States, as hereinafter prescribed, and for that purpose Virginia shall constitute the first district; North Carolina and South Carolina the second district; Georgia, Alabama, and Florida the third district; Mississippi and Arkansas the fourth district; and Louisiana and Texas the fifth district."

Section 2 declares—

"That it shall be the duty of the President to assign to the command of each of said districts an officer of the army, not below the rank of brigadier general, and to detail a sufficient military force to enable such officer to perform his duties and enforce his authority within the district to which he is assigned."

The 3d section provides—

"That it shall be the duty of each officer assigned, as aforesaid, to protect all persons in their rights of person and property; to suppress insurrection, disorder, and violence; and to punish, or cause to be punished, all disturbers of the public peace, and criminals; and to this end he may allow local civil tribunals to take jurisdiction of, and to try offenders; or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose; and all interference under color of State authority, with the exercise of military authority under this act, shall be null and void."

The 5th section provides that the authority to be exercised by the military commander shall be temporary, and cease when the State of Mississippi shall be represented in the Congress of the United States. I have read these sections for the purpose of bringing distinctly before the court what this act is. It is admitted and stated in the petition of McCardle that General Ord is in command of the fourth military district; and the record shows that he who was charged with suppressing insurrection in the State of Mississippi and preserving the public peace, arrested McCardle for inciting insurrection, disorder, and violence, and for disturbing the public peace, contrary to the provisions of said act. This is the case.

Now, what is this law? It is a law, so far as it is applicable to the case before the court, operating upon the people of Mississippi, and for the government of the military commander in that State. General Ord was in command, and here is a rule prescribed for his government by Congress, under the authority of the Constitution, conferred in very words.

If the court please, what is a military offence? Is it not a violation of a military law by a person made subject to its provisions? Is not that portion of the act which I have read a military law? Now, what is a military offence except for a person upon whom the military law operates to violate its provisions? The question is not whether McCardle is guilty of a military offence, but is he "charged" with one?

I do not know how this objection to jurisdiction is to be met, unless it be said that a military offence must be a violation of the rules and articles of war by a person in the military service of the United States. If that should be said, the decisions of this court over and over again deny the proposition. This court has time and again decided that a person may be guilty of a military offence who violates a military law which is not part of the rules and articles of war, and who himself is not in the military service. The case of Houston *vs.* Moore, 5th Wheaton, page 1, already referred to, establishes this proposition beyond all controversy. What was that case?

"Houston, the plaintiff in error, and in the original suit, was a private, enrolled in the Pennsylvania militia, and belonging to the detachment of the militia which was ordered out by the governor of that State, in pursuance of a requisition from the President of the United States, dated the 4th of July, 1814."

"The President's orders may be given to the chief executive magistrate of the State, or to any militia officer he may think proper; neglect or refusal to obey orders is declared to be an offence against the laws of the United States, and subjects the offender to trial, sentence, and punishment, to be adjudged by a court-martial."

Again, the court say—

"The first question then is, at what time and under what circumstances does a portion of militia, drafted, detached, and called forth by the President, enter into the service of the United States, and change their character from State to national militia?"

The 5th section of the act of 1795 provides for the punishment of officers or privates of the militia who do not comply with the order of the President. Its provisions are, "that every officer, non-commissioned officer, or private of the militia, who shall fail to obey the orders of the President of the United States," * * * "shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court-martial." The court say in the course of the opinion—

"It would seem that actual service was considered by Congress as the criterion of national militia, and that the service did not commence until the arrival of the militia at the place of rendzvous." * * * * "It would seem to border somewhat upon an absurdity to say that a militia-man was in the service of the United States at any time, who, so far from entering into it for a single moment, had refused to do so, and who never did any act to connect him with such service. It has already been admitted, that if Congress had pleased so to declare, a militia-man called into the service of the United States might have been held and considered as being constructively in that service, though not actually so; and might have been treated in like manner as if he had appeared at the place of rendezvous. But Congress has not so declared, nor have they made any provision applicable to such a case; on the contrary, it would appear that a fine to be paid by the delinquent militia-man was deemed an equivalent for his services and an atonement for his disobedince."

"If, then, a militia-man called into the service of the United States shall refuse to obey the order, and is consequently not to be considered as in the service of the United States, or removed from the military jurisdiction of the State to which he belongs, the next question is, is it competent to the State to provide for trying and punishing him for his disobedience, by a court-martial deriving its authority under the State."

Nobody doubted that a court-martial, organized by the authority of the United States, was competent to try and punish the offender. The point of the case was, whether the State authorities were competent to execute the United States law. The court say on this point—

"What, then, is the real object of the law of Pennsylvania, which we are considering? I answer, to confer authority upon a State court-martial to enforce the laws of the United States against delinquent militia-men."

This court held that that was a proper proceeding, and the judgment was maintained, fining this private for not responding to the call of the Governor of Pennsylvania, made in pursuance of a requisition from the President of the United States. The offence with which Houston was charged did not arise under the rules and articles of war, but under an act of Congress requiring him to do a certain act before he became a soldier of the United States. The court call it a "military offence," and say—

"Military offences are not included in the act of Congress conferring jurisdiction upon the Circuit and District Courts; no person has ever contended that such offences are cognizable before the common-law courts."

It was a military offence, because a violation of a military law. The judge who, in that case, spoke for the court, thus concluded—

"Upon the whole, I am of opinion, after the most laborious examination of this delicate question, that the State court-martial had a concurrent jurisdiction with the tribunal pointed out by the acts of Congress to try a militia-man who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent."

The authority of that case is reiterated in the case of Martin *vs.* Mott, (12 Wheaton, 19,) which came up from the State of New York, where a person had been fined for not responding to a similar call; and the officer who levied the process for the collection of the fine having been sued, the avowry which the officer made stated, in substance, "a justification of the taking of the goods and chattels, to satisfy a fine and forfeiture imposed upon the original plaintiff by a court-martial for a failure to enter the service of the United States as a militia-man, when thereto required by the President of the United States, in pursuance of the act of the 28th of February, 1795." In the course of the decision, the court say—

"Various grounds have been assigned in support of this objection. In the first place, it is said that the original plaintiff was never employed in the service of the United States, but refused to enter that service, and that consequently he was not liable to the rules and articles of war, or to be tried for the offence by any court-martial organized under the authority of the United States. The case of Houston *vs.* Moore, (5 W., 1.,) affords a conclusive answer to this suggestion. It was decided in that case, that although a militia-man, who refused to obey the orders of the President calling him into the public service, was not, in the sense of the act of 1795, 'employed in the service of the United States,' so as to be subject to the rules and articles of war; yet that he was liable to be tried for the offence under the 5th section of the same act by a court-martial called under the authority of the United States."

Here the authority of Houston *vs.* Moore is affirmed, and the opinion is delivered by a different judge—by Mr. Justice Story, in the second instance. I submit to the court, do not these cases settle that

a military offence is a violation of military law, and that it need not be a violation of the rules and articles of war? They admit that the offence was not within the rules and articles of war. Do not these cases also settle the other point that a military offence may be committed by a person who is not in the military service of the United States? If they do not settle these points, they settle nothing; for both decisions admit that the person fined never was in the service of the United States, but had refused to enter its service, and yet in each case he was held guilty of a military offence, and tried and convicted for a military offence. Why? Because he violated a portion of the act of 1795, authorizing the President of the United States under certain circumstances to call forth the militia to suppress insurrection, repel invasion, or overcome combinations too powerful to be suppressed by the ordinary course of judicial proceedings.

Now, I should like to know if the same reason does not apply to a case under the act of 1867, authorizing the President of the United States to use the army, which may be used whenever the militia could be, to suppress or prevent insurrection in Mississippi, where there is no government adequate to the protection of life and property? If it was competent in 1814 for the President of the United States, acting under a law of 1795, to call upon a militia-man of a State to aid in maintaining the laws of the United States, in suppressing insurrection or repelling a threatened invasion, and to try him by court-martial, to fine and imprison him, for refusal to respond, I desire to know if in 1867 it is not competent for the President, acting under a statute of 1867, to arrest a man inciting insurrection in Mississippi, for General Ord is admitted to be in command of the district of Mississippi, sent there by the President, acting in obedience to a statute of the United States, to suppress insurrection. And yet we are told that it is not a military offence to incite insurrection which the military, in pursuance of an act of Congress and the orders of the President, are called upon to suppress! I submit, then, that this case is excluded from the provisions of the act of the 5th of February, 1867, because the party complaining was in military custody charged with a military offence.

But perhaps it will be said that the act of March 2, 1867, is unconstitutional, while the act of 1795 was constitutional. For the purposes of this branch of the argument, suppose it is admitted, what of it? The Circuit Court cannot take jurisdiction of a case where a party is in military custody *charged* with a military offence. If the court could go into an enquiry, as to whether a military offence had been committed, it could do the very thing which the statute says it shall not do. It is a question of jurisdiction I am now arguing, and if the act of 1795 for supressing a trifling combination against the laws which a marshall could not overcome is constitutional, and would authorize the suppression of the combination by military force; and if so unreasonable a thing could be supposed, in view of that decision, as to imagine that an act in aid of the suppression of the recent monstrous rebellion, and authorizing a military officer to arrest a party inciting insurrection, was unconstitutional—if the court could come to

such a conclusion, it would have no bearing whatever upon this question of jurisdiction. How is your jurisdiction tested? Suppose the case presented be one between citizens, the record must show that they are citizens of different States. Is it a matter of any importance, so far as the question of jurisdiction is concerned, whether they are really citizens of different States or not, unless the record allege it? Suppose the jurisdiction depends upon the amount in controversy, is it a matter of any importance whether the sum claimed is justly due or not? or even if it be claimed under a void contract? Will you enter into an examination of the contract to see whether it is void, on a question of jurisdiction? It is enough if the record shows that the claim is of a sufficient amount to give jurisdiction. It is enough if the record alleges that the suit is between citizens of different States, if that be the point on which the jurisdiction turns.

So in this case, it is enough to take the case out of the statute of February 5, 1867, if the record alleges or shows that McCardle was in custody of the military authorities charged with a military offence, and the record does state the first fact; and the facts stated in the record show the second, that he is charged with having violated the act of March 2, 1867, which constitutes a military offence; and whether that be constitutional or not, or whether the charge be true or not, is, as I insist, wholly immaterial upon the question of jurisdiction.

But supposing the court should hold that the Circuit Court had jurisdiction of the case under the act of February 5, 1867, the question then arises, whether this court can inquire, as is insisted on the other side, into the validity of the act of March 2, 1867, for the more efficient government of the rebel States. We insist that it cannot; that there are certain questions which this court may properly decide, and there are certain other questions which this court has no jurisdiction to decide or, to express it as my associate has done, in deciding which, this court is bound to follow the decision of the political departments of the government. I do not suppose it will be controverted by any one, that this court is bound to follow the decisions of the political departments of the government upon purely political questions; but the great point is, what are political questions? What decisions of the political departments of the government are conclusive on this court, and what may it disregard? I suppose it will not be controverted that the political departments of the government have authority to declare war, and that no court would be competent to inquire whether it was properly or justly declared or not. I suppose the political departments of the government have a right to make treaties, and this court would not inquire whether these treaties were just or unjust, rightly or wrongly made; but would, in the decision of the case arising under them, recognize them according to their legal effect as understood by the political departments of the government by whom they were made.

I suppose that if the political departments of the government

admitted a new State into the Union, this court would never undertake to inquire whether it was rightly admitted or not, but would treat it as a State of the Union, because the political departments of the government had so decided.

At the risk of being somewhat tedious and of going over the same ground which has been occupied by my associate, as this point is important, and it seems to me decisive of the case, if the court should take jurisdiction of it at all, I will trouble the court with reading from one or two opinions upon the subject, because the views I wish to express are there presented more forcibly and in better language than I can command. The case which seems more particularly in point than any other, is that of Luther *vs.* Borden, reported in 7 Howard, where the court say: "It rests with Congress to decide what government is the established one in a State." But I shall not take up the time of the court by reading from that case, it having been so fully commented upon already. I will refer the court to another case enunciating the same principles, the case of Foster & Elam *vs.* Wilson, which will be found reported in 2 Peters, 276. This case presents distinctly the very argument relied upon by counsel on the other side. I will read what counsel said in that case—

"It was strenuously insisted in the court below, and we are apprised that the same point will be again pressed, that the judicial tribunals of the United States are precluded from investigating this question and giving a different construction to these treaties from that which they have received from the executive and legislative departments of the government. We apprehend that the question before the court is one of a purely legal kind."

I may state here, that the question before the court in that case was one involving the title to a tract of land. It was purely a case between private individuals and of a private character, in which was brought in question, not the validity of a treaty—nobody pretended that that could be questioned in a court—but the construction of a treaty; and it was held that this court was bound to follow the construction which the political department had put upon it.

Counsel proceeded—

"An American citizen has a right to demand protection from the courts of his country against the lawless acts of the executive and the unconstitutional proceedings of the legislature."

How much that sounds like the argument of counsel on the other side.

Judge Black says McCardle flees here and takes hold of the very horns of the altar of the court for protection.

Now hear the answer of the court, through Chief Justice Marshall, to that argument. I read from page 307—

"The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

"We think, then, however individual judges might construe the treaty of Ildefonso, it is the province of the court to conform its decisions to the will of the Legislature, if that will has been clearly expressed."

After showing that the legislature had expressed its will, the learned Chief Justice goes on to say—

"After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied."

The same doctrine is repeated, and in very strong language, in the case of the United States *vs.* Reynes, (9 Howard, 154,) which was also a case involving title to land and the construction of a treaty. The court say—

"This court have solemnly and repeatedly declared that this was a matter peculiarly belonging to the cognizance of those departments," [the executive and legislative,] "and that the propriety of their determination it was not within the province of the judiciary to contravene or question."

The principle is that the court was bound to follow the political departments of the government in their construction of a treaty.

Another case, of a different character, is that of the United States *vs.* Rogers, reported in 4th Howard, 567. I will read the syllabus of the case and a single sentence from the decision.

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The point of that case to which I wish to call attention is that, where the court proceeds to comment upon the policy which had been adopted by the government in regard to the Indian tribes, and where, after speaking of that policy as a proper one, the court say—

"But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet it is a question for the law-making and political department of the government, and not for the judicial. It is our duty to expound and execute the law as we find it."

The court refused to inquire whether Congress had properly or improperly extended its jurisdiction over the Indian country, and made a man in that country subject to its laws, and liable to be punished in its courts in one of the States of the Union for an offence committed in the Indian country. That was a question, the court say, for the political department of the government, and it is the duty of the court to execute the law as it finds it.

The case of Scott *vs.* Jones, (5 Howard, 343,) sustains the same principle. I will also read the syllabus of that case—

"Under the 25th section of the judiciary act of 1789, this Court has no jurisdiction to try the question whether the political authority which passed a particular law was a State, for it is only a statute of a State which can thus be re-examined."

There the court refused to inquire, and said it had no jurisdiction of the question whether a political body was a State or not; and why? Because Congress had settled it. That case is valuable for

its definition of what a State is, which is defined to be "a member of the Union and a public body owing obedience and conformity to its Constitution and laws."

I shall have occasion during the argument to refer again to this definition, which will be found in 5th Howard, page 377.

But perhaps the fullest case of all, and the one most in point, except that of Luther *vs.* Borden, is the case of Martin *vs.* Mott, (12th Wheaton, page 28,) to which I have already referred for another purpose; and I now wish to refer to it for the purpose of showing that this court follows the decisions of the political departments of the government upon political questions. That is the case of the militia-man in the State of New York, who refused to respond to a call made under the act of 1795, and I cannot do better than to read from the opinion of the court, as pronounced by Mr. Justice Story on that occasion:

"It has not been denied here that the act of 1795 is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on; for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

"The power thus confided by Congress to the President, is doubtless of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress."

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"Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

"This doctrine has not been seriously contested upon the present occasion. It was, indeed, maintained and approved by the Supreme Court of New York, in the case of Vanderheyden, *v.* Young, (11 Johns, Rep. 150,) where the reasons in support of it were most ably expounded by Mr. Justice Spencer in delivering the opinion of the court.

"But it is now contended, as it was contended in that case, that notwithstanding the judgment of the President is conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is, that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to the facts which bring the exercise within the purview of the statute.

After showing that the legislature had expressed its will, the learned Chief Justice goes on to say—

"After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied."

The same doctrine is repeated, and in very strong language, in the case of the United States *vs.* Reynes, (9 Howard, 154,) which was also a case involving title to land and the construction of a treaty. The court say—

"This court have solemnly and repeatedly declared that this was a matter peculiarly belonging to the cognizance of those departments," [the executive and legislative,] "and that the propriety of their determination it was not within the province of the judiciary to contravene or question."

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"In short, the same principles are sought to be applied to the delegation and exercise of this power, entrusted to the executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the court that this objection cannot be maintained. When the President exercises an authority confided to him by law, the presumption is that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty until the contrary is shown; and *a fortiori*, this presumption ought to be favorably applied to the chief magistrate of the Union. It is not necessary to aver that the act which he may rightfully do was so done. If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proof submitted to a jury. This view of the objection is precisely the same which was acted upon by the Supreme Coourt of New York in the case alreadyr eferred to, and, in the opinion of this court, with entire legal correctness."

I ask your honors to apply the principles of that decision to this case. That was a case where the President, invested with authority under an act of Congress, passed in 1795, to call out the militia for the purpose of suppressing insurrection and repelling invasion and dispersing combinations against the laws, had exercised that authority; and it was said that the exigency did not exist which warranted the exercise of the authority; and what was the answer of the court? That the President was the judge of the exigency, and that everybody was bound by his decision when made. But, said the counsel, he was only authorized to call out the militia when there was an actual insurrection or invasion, or danger of one, and that fact must be alleged; what say the court? If the fact was alleged, it would be traversable, and it cannot be traversed. It is a question for the decision of the political power; and the answer that the officer acted by authority of the President of the United States is conclusive, and cannot be inquired into anywhere. The President, in that case, was acting under the authority of a law. It is Congress that is authorized by the Constitution to call forth the militia to suppress insurrection and repel invasion; and in the exercise of that constitutional prerogative, Congress had devolved upon the President to decide when the call should be made. This court has decided that it would have been competent for Congress to have devolved that decision on the courts of law. Congress might have invested this court with the decision of the question when a military force should be called upon to enforce the laws; but it did not think proper to do so. It invested the President with this high power. Counsel said he might abuse it; he might make war upon Massachussets when there was no insurrection there; and what did the court say? That the President is to judge of the exigency, and he having decided that it existed, the question is not traversable elsewhere.

What is this case? Congress having decided that there is no legal government in Mississippi, and invested by the Constitution with the express power, has itself decided to call forth the military power of the nation to suppress insurrection in that State; and counsel wish to traverse the facts on which Congress passed, and the President is proceeding to execute the law.

They say it is all peace in Mississippi, and has been for two years. The authority which I have read shows that the act of the Presi-

dent in deciding that an insurrection exists, and calling forth the military power in pursuance of authority delegated to him by Congress, cannot be questioned; can the act of Congress itself, then, in doing the same thing, be questioned? But in this case, both Congress and the President have decided that the exigency existed which required the exercise of the military power to prevent insurrection in Mississippi. The President sent General Ord to Mississippi to suppress insurrection in obedience to an act of Congress. Now, is this court to inquire whether the facts existed that authorized the sending of the military forces there? Is this court to inquire whether the military officer did right in arresting McCardle, who was inciting insurrection, when both Congress and the President directed it, when it would not inquire whether the military authority did right in arresting Mott, who refused to respond to a call of the President, under the act of 1795, and said it would make no inquiry as to whether the President judged rightly of the exigency or not?

Here you have both political departments of the government acting together. The legislative department in so many words says there is no legal government in Mississippi adequate to the protection of life and property, and it directs the President of the United States to assign a general of the army to the command of that rebel State, and places a military force at his disposal to preserve the public peace. The officer goes there, and in the exercise of his authority, as commander, in obedience to a law of Congress and the command of the President, he arrests a man inciting insurrection; and counsel propose now to traverse the fact whether the political departments of the government have judged rightly in regard to the condition of Mississippi, and whether McCardle was inciting insurrection.

As well might this court inquire whether General Grant and his brave troops did right, when, acting under the direction of the political departments of the government, they poured shot and shell into Vicksburg and compelled a rebel army to surrender. Counsel propose, in other words, to do the very thing which this court says cannot be done, and which it says would render ineffectual the power to suppress insurrection or repel invasion.

It does seem to me that this decision, in connection with that in Luther *vs.* Borden, is decisive of this point, and that this court will not undertake to supervise the decision of the political departments of the government, that the exigency existed which required the use of the military power in Mississippi to preserve the peace and suppress insurrection

But suppose this court, on whom Congress has not conferred the power vested in itself by the Constitution, of determining when the military power shall be used to enforce the laws and suppress insurrection, should take upon itself to decide that question on the ground that this power is being abused by Congress? what then? Judge Story answers that question, when he says that any power is liable to abuse. Would it not be liable to abuse if placed in this court? Suppose the framers of the Constitution had thought proper to invest the

Supreme Court with the authority to call forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; would it not have been liable to the same abuse as now? Power may be abused wherever lodged. The people who made the Constitution thought proper to lodge this power in another department of the government. Having lodged it there, the fact that it may be abused is no argument against its existence; all the powers of the government may be abused; congresses and legislatures may abuse the powers which are conferred upon them to make laws; and executives may abuse the powers with which they are entrusted, and so may courts. But if you would maintain government, if you would preserve order, if you would protect the peace of society and secure individual rights, power must be lodged somewhere; and the only question here is, where has it been lodged, and the Constitution settles that. But if, as I said, you were to make inquiry as to what was the condition of Mississippi, and as to whether this power was properly exercised, what would you find?

In 1817 that portion of the territory of the United States now constituting the State of Mississippi was authorized to form a constitution and State government, preparatory to its admission into the Union. In December, 1817, Mississippi, under this constitution and State government thus formed, was admitted as one of the States of the American Union by an act of Congress, reciting the fact that it had formed a constitution and a State government in conformity to the enabling act. It continued to be one of the States of this Union, owing obedience and conformity to the Constitution and the laws of the Union, until 1861. In 1861 the enemies of the Constitution and the Union usurped control of the State of Mississippi, and destroyed that State government and that constitution which had been framed in 1817 in conformity to the laws and the Constitution of the United States, and set up a government in hostility to, and which made war upon, the United States. One of the gentlemen on the other side, in a brief filed in regard to another State, but which has been furnished to us in this case, and I suppose is to be made applicable to the State of Mississippi, says:

"Advancing, then, to the question of fact, as one of which this court takes judicial notice, what do we see? We see a State government in Georgia (Mississippi in this case) established under a written constitution, carried on by separate departments, legislative, executive, and judicial, and continued in an unbroken line from the Declaration of Independence"——

I suppose the gentleman would say, in this case, from 1817, when Mississippi was admitted into the Union,——

——"until the passage of these military reconstruction acts; unbroken, I should have said, save in a single instance, when the military officers of the United States forbade the legislature of the State to assemble, or her courts to hold their sessions."

Is that true? Did the State of Mississippi have an unbroken State government from 1817 to the time when the United States forces intervened? Was it a State government in a constitutional sense when it was making war upon the United States? The Constitution of the United States required that every member of its legislature should be sworn to support this Constitution. Every member of its

legislature, not only was not sworn to support this Constitution, but took an oath to support a constitution in hostility to this. Its State government did every act which this Constitution said it should not do. It entered into alliances and confederations with the enemies of the Constitution and the Union. It kept troops and ships of war. It engaged in war, and sought to enter into agreements and alliances with foreign States. And yet we are told this was a State of the American Union all the time! Can it be possible to maintain such a position? Had the United States no authority to defend itself by arms against the hostile State organization which was warring upon it, and to overthrow and destroy it? For the purpose of overthrowing that hostile government, of which Mississippi as a State was part, the government of the United States called forth more than two millions of men, who went forward to seize, imprison, and slay the enemies of the country, and to overthrow their hostile organizations. That chain which made Mississippi a State in 1817 was broken when she set up a government in hostility to the government of the United States. It ceased then to be a State of the American Union; that is to say, its political organization as a State of the American Union was destroyed. Its territory and its people remained, and I agree that its people in a legal sense were subject all the time to the laws of the United States. It was impracticable for a time to enforce the laws of the United States in Mississippi, owing to the hostile political organizations which had been set up in the place of the State government, which had been supplanted; but the people of Mississippi were legally as much subject to the laws of the United States during that period as before or since the rebellion.

In order properly to understand the condition of things, we must look at the precise relation which a State bears to the United States. Each posseses certain powers independent of the other.

So far as the State of Mississippi had powers not limited or controlled by the powers conferred on the federal government, it was just as independent of the federal government, in the exercise of its State powers, as would be Spain in the exercise of the same powers. What are these powers belonging exclusively to a State? I answer: The authority to regulate its local affairs; to administer its domestic concerns. The State of Mississippi had a right to organize its judiciary; to elect its judges by the people, or to provide for their appointment by the governor; to provide for the election of a governor; how long he should serve; to provide for a legislature; for the punishment of crimes within its borders; and generally, to regulate its internal affairs, just as independently of the United States as has any foreign government. All these powers—and they are the chief powers of government—belong to the States. Only a few general powers are conferred by the Constitution upon the federal government. The great mass of powers, designed for the protection of the citizen, and the peace and good order of society, the administration of justice, the punishment of crime, and the enforcement of rights between man and man, are left to the States.

It was in the exercise of these powers, which never belonged to the government of the United States, that Mississippi made war upon the United States. It made war as a State; that is to say, the same people, who in 1817 made a constitution and State government owing obedience and conformity to the Constitution and laws of the United States, which constituted Mississippi a State of the Union, and without which it could not have become such State, in 1861 destroyed that constitution and State government, and substituted in its place a hostile constitution and State government, which not only denied obedience and conformity to the Constitution and laws of the United States, but made war upon them, whereby it ceased to be a State of the Union, or to have any rights as such, and became a hostile State. The United States then had the same right to conquer and subdue it, as it would Spain or any other hostile power with which it should be at war. The United States did not conquer itself in this war; it did not conquer its own power which it had under the federal Constitution over the State of Mississippi or its inhabitants, but it did conquer and subjugate that political power in Mississippi which never belonged to the United States, and which had become hostile to it. The war was between the United States and the State of Mississippi, wielding power belonging to it, independently of the United States, and it was in that contest that the State of Mississippi was overcome.

What is the position of the United States then, when it has overcome this hostile State organization in Mississippi? It has all the powers that it wrested from this hostile organization; it has conquered all the powers that Mississippi had as a State, and has possessed itself as completely of all power over the inhabitants of Mississippi as it would have had if Mississippi had been a portion of the kingdom of Spain; Mississippi has no rights left.

The federal powers exist as they did before the war; the State powers have been conquered by the arms of the United States; that this was a war with the State of Mississippi, this court has decided. To show this, I will read a few sentences from its opinion in the PRIZE CASES.—(2 Black, 635.)

"The law of nations is also called the law of nature. It is founded in the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies, because they are traitors; and a war levied on the government by traitors, in order to dismember and destroy it, is not a war, because it is an 'insurrection.'

"Whether the President, in fulfilling his duties, as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him"—by him, of course, under the authority of law—"and this court must be governed by the decisions and acts of the political department to which this power was entrusted."

There is another sanction of the doctrine for which we have been contending, that this court is bound by the acts and decisions of the political departments of the government, to which this power of deciding, when an insurrection exists and when it is necessary to call forth troops, is entrusted.

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There is another sanction of the doctrine for which we have been contending, that this court is bound by the acts and decisions of the political departments of the government, to which this power of deciding, when an insurrection exists and when it is necessary to call forth troops, is entrusted.

"If it were necessary to the technical existence of a war that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the legislature of 1861, which was wholly employed in enacting laws to enable the government to prosecute the war with vigor and efficiency."

I will now read the reply of this court to another argument made in those cases—

"They contend, also, that insurrection is the act of individuals, and not of a government or sovereignty; that the individuals engaged are subjects of law; that confiscation of their property can be effected only under a municipal law; that by the law of the land such confiscation cannot take place without the conviction of the owner of some offence; and finally, that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the national government, and, consequently that the Constitution and laws of the United States are still operative over persons in all the States for punishment as well as protection.

"This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be a sovereign cannot for some unknown reason exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle-field or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is *'unconstitutional!'*

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That is the language of this court. Mississippi made war as a State; it was conquered as a State. The same principle is reiterated again by this court in the case of Mrs. Alexander's cotton, (2d Wallace, p. 419,) where the court say—

"It is said that, though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause, and that her property therefore cannot be regarded as enemy property; but this court cannot inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies, until, by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.

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It was in the exercise of these powers, which never belonged to the government of the United States, that Mississippi made war upon the United States. It made war as a State; that is to say, the same people, who in 1817 made a constitution and State government owing obedience and conformity to the Constitution and laws of the United States, which constituted Mississippi a State of the Union, and without which it could not have become such State, in 1861 destroyed that constitution and State government, and substituted in its place a hostile constitution and State government, which not only denied obedience and conformity to the Constitution and laws of the United States, but made war upon them, whereby it ceased to be a State of the Union, or to have any rights as such, and became a hostile State. The United States then had the same right to conquer and subdue it, as it would Spain or any other hostile power with which it should be at war. The United States did not conquer itself in this war; it did not conquer its own power which it had under the federal Constitution over the State of Mississippi or its inhabitants, but it did conquer and subjugate that political power in Mississippi which never belonged to the United States, and which had become hostile to it. The war was between the United States and the State of Mississippi, wielding power belonging to it, independently of the United States, and it was in that contest that the State of Mississippi was overcome.

What is the position of the United States then, when it has overcome this hostile State organization in Mississippi? It has all the powers that it wrested from this hostile organization; it has conquered all the powers that Mississippi had as a State, and has possessed itself as completely of all power over the inhabitants of Mississippi as it would have had if Mississippi had been a portion of the kingdom of Spain; Mississippi has no rights left.

The federal powers exist as they did before the war; the State powers have been conquered by the arms of the United States; that this was a war with the State of Mississippi, this court has decided. To show this, I will read a few sentences from its opinion in the PRIZE CASES.—(2 Black, 635.)

"The law of nations is also called the law of nature It is founded in the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies, because they are traitors; and a war levied on the government by traitors, in order to dismember and destroy it, is not a war, because it is an 'insurrection.'

"Whether the President, in fulfilling his duties, as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him"—by him, of course, under the authority of law—"and this court must be governed by the decisions and acts of the political department to which this power was entrusted."

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That is what it conquered; and having possessed itself by conquest of all the powers which belonged to the State of Mississippi, what may it do? I shall not take much time in answering that question, but as a synopsis of the undisputed law on this subject, I refer to a section of Story, to be found in the 2d volume of his Commentaries on the Constitution, page 22, section 1324.

"As the general government possesses the right to acquire territory, either by conquest or by treaty, it would seem to follow, as an inevitable consequence, that it possesses the power to govern what it has so acquired. The territory does not, when so acquired, become entitled to self-government, and it is not subject to the jurisdiction of any State. It must consequently be under the dominion and jurisdiction of the Union, or it would be without any government at all. In cases of conquest, the usage of the world is, if a nation is not wholly subdued, to consider the conquered territory as merely held by *military occupation* until its fate shall be determined by a treaty of peace. But during this intermediate period it is exclusively subject to the government of the conqueror."

In this case no treaty of peace could be made between Mississippi and the United States. We must apply this international law to the condition of things in this country, growing out of the relation which exists between the States of the Union and the Federal Government. Here was a war between the State of Mississippi and the Federal Government. The Federal Government had certain powers over Mississippi before the war began. Mississippi undertook to throw off those powers and to use the powers which she had, which belonged to her as a State independent of the United States, which the United States Government never had any more control over than it has over the same power exercised by the Czar of Russia; she undertook to use those powers which belonged to her exclusively, for the purpose of organizing armies and resisting the Government of the United States in the exercise of the powers which belonged to it. In that contest Mississippi failed; she was conquered, and lost those State rights of her's as completely as if they had been rights wielded by a foreign nation. When conquered, according to this law of nations, the country would have been held in military occupation until a treaty of peace was made. Owing to the peculiar relations existing here under this Federal Government, no treaty of peace can be made. How long then is the rebel country to be held in military occupation? I answer, until civil governments are established, which will recognize obedience to the Constitution and laws of the United States, and act in con-

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"They do not participate in political power; nor can they share in the powers of the general government, until they become a State and are admitted into the Union as such. Until that period, the Territory remains subject to be governed in such manner as Congress shall direct, under the clause of the Constitution under consideration."

Which was the one in regard to the authority of Congress over the terrritory of the United States not incorporated into a State.

"What shall be the form of the government established in the Territories, depends exclusively upon the discretion of Congress. Having a right to erect a territorial government, they may confer on it such powers, legislative and executive, as they may deem best. They may confer upon it general legislative powers, subject only to the Constitution and laws of the United States. If the power to create courts is given to the territorial legislature, those courts are to be deemed strictly territorial, and in no just sense constitutional courts in which the judicial power conferred by the Constitution can be deposited."

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"In the mean time, the condition of the people of California is anomalous, and will require, on their part, the exercise of great prudence and discretion. By the conclusion of the treaty of peace the military government, which was established over them under the laws of war, recognized by the practice of all civilized nations, has ceased to derive its authority foom this source of power."

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Mr. Buchanan said further—

"But is there, for this reason, (because peace is established,) no government in California. Are life, liberty, and property under the protection of no existing authorities? This would be a singular phenomenon in the face of the world, and especially among American citizens, distinguished, as they are, above all other people, for their law-abiding character. Fortunately, they are not reduced to this sad condition. The determination of the war left an existing government, a government *de facto*, in full operation."

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"The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it."

How was it to be governed? As a conquest, "until the sovereignty to which it had passed had legislated for it." How is Mississippi to be governed? As a conquest, until the authority to which its State government has passed shall legislate for it.

"That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been *legislatively* changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so, as it was continued until the people of the territory met in convention to form a State government, which was subsequently recognized by Congress, under its power to admit new States into the Union."

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And finally say the court—

"Our conclusion, from what has been said, is, that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty, or from its ratification. We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States."

We are not driven to assume any such ground as is taken in that case, because no treaty of peace has been made with the rebel States, nor has military supervision ever been withdrawn. The case of Cross *v.* Harrison establishes the belligerent right to set up a government under military authority in Mississippi. This court has decided that the United States had belligerent rights against the State of Mississippi, and treated with derision the argument that it was unconstitutional for the sovereign power to exercise belligerent rights towards a people who had organized armies and were expelling its authority. Having this belligerent right, the United States had the right to establish a government, and, beyond question, to continue it until a treaty of peace. In a case of this kind there can be no treaty of peace, because there is no party with whom to make it. How long then shall the government set up by the military be continued? It must be continued until a State government can be organized, owing obedience and conformity to the Constitution and laws of the United States; who is to decide when that time comes? Congress; and nobody else can decide it.

But we are pressed with the argument that McCardle was entitled to a jury trial; that Congress cannot govern the State of Mississippi contrary to the Constitution; that while the United States may have belligerent rights over the people of Mississippi growing out of the war, in the exercise of their belligerent rights it cannot do any act forbidden by the Constitution. I assent to the proposition that Congress, in doing a legitimate act, cannot use means which the Constitution forbids it to use in doing that act; but it may use means in the constitutional exercise of one power, which it would be prohibited from using in the exercise of a different power.

To illustrate: The 2d article of the amendments to the Constitution reads thus: "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." Does any one doubt the right of our armies, as they advanced into the rebel States during the rebellion, to disarm the people of those States? Does any one question the right of Grant to disarm the people of Vicksburg when he captured the city? or of Sherman to disarm the inhabitants of Georgia when he swept through the State? And yet this was making use, in the exercise of a power granted in one part of the Constitution, of a means prohibited in the exercise of a power granted in another part. It is manifest that the clause securing to the people the right to bear arms applies to the people of a friendly State, and not to those who would use them against the government. So the right of jury trial is intended for the protection of the citizen in peaceful times, when justice can be administered through the courts; but it has no application to a state of war, when juries cannot be empanneled, or to a

state of society where the judicial tribunals are overthrown, and courts and juries are utterly powerless to preserve order or administer justice.

It is just as constitutional to make war as it is to empannel a jury. Both are provided for, though the same provisions of the Constitution do not apply to both. It will not be contended that when Lee, with his hundred thousand rebels, was charging upon our lines at Gettysburg, that our soldiers had no right to shoot them down without judge or jury. The jury trial did not apply to that field of battle. Nobody would contend that it did. Then there are cases where men may be constitutionally slain, without the intervention of judge or jury. The Almighty has said, "Thou shalt not kill;" and yet who denies the right to kill in self-defence, or in execution of the laws of the land?

Where is the dividing line?

I have never been one of those who believed the military above the civil power. I have never been one of those who believed it necessary to exercise powers not granted by the Constitution, even to suppress the monstrous rebellion. I think the Constitution, rightly interpreted, gave all the power necessary to be exercised in that terrible struggle.

A mistake has arisen in applying povisions of the Constitution applicable to a condition of peace to a state of war. We had lived for a generation in peace. We were familiar with the guaranties of the Constitution for the protection of the citizen. We were unaccustomed to war, and to the exercise of the war powers conferred by the Constitution; but they are as clearly given, and their exercise is as clearly constitutional, as are the powers that are conferred for the protection of individual liberty. The question is when are they to be exercised; and I agree that it is often difficult to draw the precise line between the justice which a people may obtain through the peaceful administration of the laws, and that which they have a right to demand at the cannon's mouth. It is difficult to determine the precise point where civil authority ceases and military power begins. Either may call to its aid the other. In peaceful times, when the process of the court is obstructed by combinations too powerful to be overcome by the marshal with the ordinary assistance at his command, he may call to his aid the military power; and in that instance the military acts in subordination to the civil power. The military power, when it has partially overcome the enemy in the field, may call to its assistance the civil power to administer the laws between citizen and citizen; and in that instance the civil power acts in subordination to the military.

There is a technical answer to the complaint that a jury trial is not extended to McCardle.

What says the Constitution? "No person shall be held to answer for a capital or otherwise infamous crime, except on presentment of indictment of a grand jury." Is McCardle charged with a capital or infamous crime? One of the charges against McCardle is disturbing the public peace. Did anybody ever hear of empanelling a jury

And finally say the court—

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to try a man for a breach of the peace? If McCardle is properly in custody on any one of the charges, this court will not release him. He is also charged with inciting insurrection, disorder, and violence, contrary to the statute of March 2, 1867, which, though infamous acts, are not made capital or infamous crimes by the statute. Technically, McCardle does not come within this provision of the Constitution; his is not such a case as would entitle him, under any circumstances, to a jury trial?

But whence is derived the power of Congress to pass the act of March 2, 1867, so far as it relates to this case? In the observations which I now have to make, I do not propose to speak of the general reconstruction acts; they are not before the court; the only question before the court is one growing out of the exercise of military authority by General Ord, under the act of March 2, 1867, and all I shall attempt to show is, that Congress had authority to pass so much of the act of March 2, 1867, as applies to the arrest of McCardle.

I claim as much respect and veneration for the Constitution, and prize as highly its guarantees for the liberty of the citizen as any man. I believe that the peace of this people, the progress of this nation, and our liberties generally are best to be promoted by maintaining the Constitution as our fathers made it, with only such changes made in the constitutional way as experience shall show to be necessary.

The Constitution was intended to be perpetual. It was made to be immortal; and I believe in no such construction of its provisions as will destroy its vitality.

Having said this much, I call the attention of the court to those grants of power in the Constitution which seem to me to confer on Congress the right to pass the act in question.

The Constitution says—

"The Congress shall have power to declare war; to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Congress, then, has express authority conferred upon it to make war and to suppress insurrection. In the exercise of these war powers, Congress called forth more than two million of men to put down the recent rebellion. It is invested with all power necessary and proper to carry these express powers into effect. One of the express powers is to supress insurrection. How is that to be carried into effect if the rebels, the moment their armies are overthrown, are permitted to organize anew for another rebellion? Does not the power to make war, the power to call forth the army to put down insurrection, and the power to make all laws necessary and proper to make these powers effectual, carry with it the power to exact such guarantees after a war is over as will protect the government against its recurrence? The war power is unlimited, and courts cannot stay it. As a mere question of power, Congress might have directed the

armies of the Union, as they swept over the South, to lay it waste with fire and sword, and slaughter its inhabitants. I agree that to have done this, would have outraged the civilization of the age; would have called down upon this nation the execrations of mankind, and would have violated international law as understood among civilized nations. But what is international law?

Is it anything more than the recognition of certain principles or customs by the common consent of nations? Is there any common arbiter to enforce international law? Can courts do it as against the sovereign power? Not for a moment. The sovereign power which makes war may make it as terrible and as destructive as it pleases. War means desolation, death, and destruction; and we have seen within the last few years that such is its practical operation. I undertake to say that it would have been competent for the political departments of the government to have instructed the commanders of our armies to refuse the surrender of any of the rebel armies on condition of protection, and this court could not have interfered. I am arguing this question simply as one of power. No such thing was done. The humanity of the age would have cried out against it. The enlightened civilization of the Union people would not have tolerated it. But nevertheless, as Chief Justice Marshall said, in a case that has been quoted in your hearing to-day, although the sovereign might not disregard these laws and customs of nations without obloquy, he could nevertheless disregard them.

I claim, then, that the power exercised by Congress in passing the act of March 2, 1867, is clearly within the Constitution, and falls far short of the power it might have exercised; that the provisions of the Constitution, in regard to jury trials and to civil courts, apply to a state of case where the law can be administered through the civil tribunals, not to cases where they are overborne and expelled by force. There was a necessity, when the conflict of arms ceased, to pass some statute for the protection of Union men in the rebel States. Was it to be tolerated for a moment, that after the rebel armies were dispersed Union men in the rebel States should be left to the mercy of the enemies of the country, who had only ceased to fight in the field when their arms were wrenched from their hands?

Hundreds and thousands of Union men in Mississippi and the other rebel States, for no cause except fidelity to their country, were persecuted, arrested, fined, and imprisoned by rebel officials, after the rebel armies had been dispersed. Tell me what nation could or ought to be preserved, that would abandon its defenders to such a fate. I have before me the evidence of the persecution of loyal citizens in an order issued for their protection in 1866, and which nothing but an urgent necessity could have called forth. I will read the order:

[General Orders, No. 3.]

WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE,
Washington, January 12, 1866.

To protect persons against improper civil suits and penalties in late rebellious States:

Military division and department commanders, whose commands embrace or are composed of any of the late rebellious States, and who have not already done so, will at once issue and enforce orders protecting from prosecution or suits in the State or municipal courts of such State, all officers and soldiers of the armies of the United States, and all persons thereto attached, or in anywise thereto belonging, subject to military authority, charged with offences for acts done in their military capacity or pursuant to orders from proper military authority; and to protect from suit or prosecution all loyal citizens or persons charged with offences done against the rebel forces, directly or indirectly, during the existence of the rebellion; and all persons, their agents or employees, charged with the occupancy of abandoned land or plantations, or the possession or custody of any kind of property whatever, who occupied, used, possessed, or controlled the same pursuant to the order of the President, or any of the civil or military departments of the government, and to protect them from any penalties or damages that may have been or may be pronounced or adjudged in said courts in any of such cases; and also protecting colored persons from persecutions in any of said States charged with offences for which white persons are not prosecuted or punished in the same manner and degree.

By command of Lieutenant General Grant:

E. D. TOWNSEND,
Assistant Adjutant General.

Another order issued from the Army Headquarters is as follows:

"HEADQUARTERS ARMIES OF THE UNITED STATES,
"*Washington, February* 17, 1866.

"You will please send to these headquarters as soon as practicable, and from time to time thereafter, such copies of newspapers published in your department as contain sentiments of disloyalty and hostility to the government in any of its branches, and state whether such paper is habitual in its utterances of such sentiments. The persistent publication of articles calculated to keep up hostility of feeling between the people of the different sections of the country cannot be tolerated. This information is called for with a view to their suppression, which will be done from these headquarters only.

"By command of Lieutenant General Grant:

"T. S. BOWERS,
"*Assistant Adjutant General.*"

I read these orders to show the condition of things prior to the passage of the act of March 2, 1867. Can you suppose that when these orders were issued to protect the soldiers of your army from persecution and imprisoment for acts done in suppressing the rebellion, there was no occasion for them? The whole land resounded with the knowledge of the fact that Union men were daily being persecuted in all the rebel States for no other cause than loyalty to their government. To say that the government could not protect them because the rebel armies had been dispersed, would be to admit that the government had no power to preserve itself.

I have now gone substantially over the ground which I intended to occupy.

The propositions which I have endeavored to maintain are, first, that this court has no jurisdiction of the case, because the act of February 5, 1867, did not authorize the Circuit Court to take jurisdiction of it.

2d. That if it has jurisdiction, it is bound to follow the decision of the political departments of the government and hold that no legal State government exists in Mississippi, and that its condition is such

as to warrant the employment of a military force therein to prevent insurrection and preserve the public peace.

3d. That Congress having called forth this military power, and the President having assigned a general of the army to command in Mississippi, this court cannot question the propriety of what has been done.

4th. If, however, the court should hold differently, and that it may inquire into these questions, then it is insisted that the act of Congress of March 2, 1867, is strictly constitutional, and that the power to pass it is to be found in the specific grants of war powers to Congress by the Constitution.

5th. It is insisted that, according to the law of nations, this government, having belligerent rights, had authority, through its military power, to inaugurate a government at the close of the war over the people of Mississippi, temporarily at least; that there must be a time between the overthrow of the hostile government and the inauguration of a new civil government, when to prevent anarchy the military authority must intervene, and it is for Congress to determine how long that intervention is necessary. But if this court was competent to make the inquiry, it is insisted the facts of the case are such as to warrant the exercise of military power in Mississippi for the present.

We say next, that the jury trial which is guaranteed by the Constitution is no more a constitutional right than the right to make war and suppress insurrection, and that both these provisions of the Constitution are to be construed with reference to the state of things to which they are applicable; that a jury trial is as inapplicable to a state of war as is an army to the decision of judicial questions in time of peace. The powers are distinct, and one just as constitutional as the other.

I might very aptly conclude what I have to say with a quotation from Chief Justice Marshall on the character of the Constitution, in the case of Cohens *vs.* Virginia, (6 Wheaton.) He said:

"A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests; and its framers must be unwise statesmen, indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day."

I ask this court to apply the patriotic language of that eminent jurist to the present condition of things. I ask the court not to lose sight of the fact, that to preserve the liberty of the citizen, it is necessary also to maintain the authority of the government. It is by virtue of the Constitution and the laws that you yourselves preside here. Can the Constitution be maintained, if the doctrine is to prevail that this government has not the necessary power to perserve itself?

And how can it preserve itself if the moment a hostile State is overcome in arms, its traitorous subjects can inaugurate a new government for the persecution of Union men? The only reason for interfering in the rebel States after the close of the war was to protect

Union men, and have governments that should be in obedience and conformity to the Constitution and the laws of the United States. Does not the power exist to exact such conditions? If it does not, then the Constitution of the United States is a failure. I cannot believe this court will come to such a conclusion, as it would render the whole war abortive, and deny to the government the means of self-preservation. No; as you love the Constitution, and as you love liberty protected by the Constitution, I beg you remember that the two are inseparable, and that any construction of the former which shall take from it the means of self-preservation, will also destroy the liberties it was made to secure.

SUPREME COURT OF THE UNITED STATES.

December Term, 1868.

Ex parte: WILLIAM H. McCARDLE.

BRIEF TO RESIST MOTION FOR JUDGMENT.

LYMAN TRUMBULL,
MATT H. CARPENTER,
Of Counsel for U. S.

J. B. Yewdale, Law Printer, Milwaukee.

SUPREME COURT OF THE UNITED STATES.

Ex parte: WILLIAM H. McCARDLE.

The appellant, William H. McCardle, filed his petition in the Circuit Court of the United States for the Southern District of Mississippi, on the 11th day of November, 1867, for a writ of *habeas corpus*, to be directed to General Ord, or General Gillem, or both, by whom, or by whose orders, the petitioner alleged he was illegally imprisoned. The writ was issued, and the body of the appellant was produced in court, and full return made, setting forth the cause of imprisonment.

No issue was made upon the facts stated in the return; but the appellant moved for his discharge upon the ground of the insufficiency of the return as matter of law. The Circuit Court held the return sufficient, and remanded McCardle to the custody from which he had been taken by the writ of *habeas corpus*. McCardle then took his appeal from the decision and judgment of the Circuit Court, under the act of Feb. 5, 1867; 14 Stat. at

large, 385. Pending this appeal, and after the cause had been heard and submitted to this Court, Congress, by the act of March 27th, 1868, 15 Stat. at large, 44, provided, Sec. 2 :

"That so much of the act approved February five, "eighteen hundred and sixty-seven, entitled 'An act to "amend an act to establish the judicial courts of the "United States, approved September twenty-fourth, sev- "enteen hundred and eighty-nine,' as authorizes an ap- "peal from the judgment of the Circuit Court to the "Supreme Court of the United States, or the exercise of "any such jurisdiction by said Supreme Court on appeals "which have been or may hereafter be taken, be and "the same is hereby repealed."

I.

It is clear that this Court had no jurisdiction of this proceeding—*an appeal from the Circuit Court*—except under the act of February 5, 1867 ; and so this Court held on the motion to dismiss made by us.

Ex. parte McCardle, 5 *Wallace*, 318.

II.

The act conferring the jurisdiction having been repealed, the jurisdiction ceased; and the Court had there-

after no authority to pronounce any opinion or render any judgment in this cause.

This proposition is so clear, that no argument can be required to sustain it. No court can do any act in any case, without jurisdiction of the subject matter; and any act attempted to be done under such circumstances is simply *void*. It can make no difference at what period in the progress of a cause, the jurisdiction ceases. After it has ceased no judicial act can be performed.

In *Insurance Co. vs. Ritchie*, 5 *Wallace* 554, the chief justice, delivering the opinion of the Court says: "It "is clear, that when the jurisdiction of a cause depends "upon the statute, the repeal of the statute takes away "the jurisdiction." And in that case, the repealing statute which was passed during the pendency of the cause, was held to deprive the court of all further jurisdiction.

This is the uniform doctrine of this court and of all courts. The causes which were pending in this Court against states, were all dismissed by the amendment of the constitution denying the jurisdiction; and no further proceedings were had in those causes.

Hollinsworth vs. Virginia, 3 *Dallas*, 378.

In Norris v. Crocker, 15 *How.* 429, this court affirmed and acted upon the same principle; and the exhaustive argument of the present Chief Justice then at the bar, reported in that case, and the numerous authorities there

cited, render any further argument or citation of cases unnecessary.

Rex. Justices London, 3 *Burr.* 1456.
Yeaton v. U. States, 5 *Cranch*, 281.
Schooner Rachael, v. U. States, 6 *Cranch*, 329.
U. S. vs. Preston, 3 *Pet.*, 57.
Com. v. Marshall, 11 *Pic.* 350.

LYMAN TRUMBULL,
MATT H. CARPENTER,
Of Counsel for U. S.

Supreme Court of the United States.

DECEMBER TERM, 1868.

No. 223.

Ex-parte, WILLIAM H. McCARDLE,

Appellant.

BRIEF OF RESPONDENTS,

TOUCHING THE EFFECT OF THE REPEALING ACT OF MARCH 27th, 1868.

ENOCH TOTTEN,

Counsel.

J. L. Pearson, Printer, corner 9th and D streets.

Supreme Court of the United States.

DECEMBER TERM, 1868.

No. 223.

Ex-parte,

WILLIAM H. McCARDLE,

Appellant.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR RESPONDENTS.

In November, 1867, the appellant filed his petition in the Circuit Court, for the Southern District of Mississippi, alleging that he was illegally restrained of his liberty, by Gen. Gillem or Gen. Ord, or both; and prayed for a writ of *habeas corpus*, to be directed to the said officers. The writ was accordingly issued, and, in pursuance thereof, the appellant was produced in Court, and a full return made, setting forth the cause of the imprisonment. The Court decided, that the return was sufficient in law, and ordered that the prisoner be remanded to custody. From this judgment, an appeal was taken to this Court, under the provisions of the act of February 5, 1867. The appeal came on to be heard, and was argued by counsel, on the 2d, 3d, 4th and 9th days of March, 1868. But no judgment was rendered in the cause.

On the 27th day of March, 1868, an act of Congress was finally passed, and became a law, repealing so much of the act of February 5, 1867, as authorized appeals in cases of this character. The second section of said act is in the words following:

"SEC. 2. *And be it further enacted*, That so much of the act approved February five, eighteen hundred and sixty-seven, entitled 'An act to amend an act to establish the Judicial Courts of the United States,' approved September twenty-fourth, seventeen hundred and eighty-nine, as authorizes an appeal from the judgment of the Circuit Court, to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals, which have been or may hereafter be taken, be and the same is hereby repealed."

The question arising now, for consideration, is, whether or not, this Court has legal authority to determine the said appeal, notwithstanding the said act of Congress.

The appellate jurisdiction of this Court is qualified. It can exercise no appellate jurisdiction in any case, unless such jurisdiction is conferred upon it, by an act of Congress; and a rule is prescribed, to regulate the proceedings therein.—(*Wiscart v. Dauchy*, 3 Dal., 327; *Barry v. Marcien*, 5 How., 118.)

The Constitution of the United States, gives to Congress the power to "except" any or all of the cases, mentioned in the jurisdictional clause of that instrument, from the appellate jurisdiction of the Supreme Court.—(Art. III, sec. 2.) It was clearly the intention of Congress, by this act, to so "except" all cases of this kind, whether pending, or thereafter to be brought.

This Court never had appellate jurisdiction in such cases, until such jurisdiction was authorized by the act of 5th February, 1867. That act, so far as it confers authority to determine appeals, either pending then, or to be brought subsequently, has been repealed. When an act of Congress is repealed, it must be considered the same as if it had never been passed, except such parts as

are saved by the repealing statute.—(*Surtees v. Ellison*, 9 Barn. & Cress., 730; *Butler v. Palmer*, 1 Hill, 324.)

When the jurisdiction of a Court to determine a case, or a class of cases, depends upon a statute, and the statute is repealed, the jurisdiction ceases obsolutely. If any cause be pending at the time of such repeal, it falls.—(*Rex v. Justices of London*, 3 Burrow, 1456; *Norris v. Crocker*, 13 How., 429; *Ins. Co., v. Ritchie*, 5 Wallace, 541; *Gale v. Wells*, 7 How., Pr. Reps., N. Y. Court of Appeals; *Hollinsworth v. Virginia*, 3 Dal., 378.)

ENOCH TOTTEN,
Counsel for Respondents.